PJLEL
P-ISSN - 2830-4675 (PRINT)
E-ISSN - 2964-724X (ONLINE)
PROTECTION: JOURNAL OF LAND AND ENVIRONMENTAL LAW
Indexed By : GARUDA Google ISJD EBSCO

NOMINEE ARRANGEMENT IN THE PRACTICE OF LAND SALE AND PURCHASE IN INDONESIA

Indrasari KRESNADJAJA[1], I Made Pria DHARSANA[2]
[1]Notary Public South Jakarta Capital Region of Jakarta, Indonesia
[2]Master of Notary Study Program, Postgraduate Faculty, Warmadewa University, Indonesia
Corresponding author: Indrasari Kresnadjaja
E-mail: imadepriadharsana@gmail.com

Info Artikel:
Received: 2024-09-01 Revised: 2024-10-25 Accepted: 2024-12-15
Vol: 2 Number: 2 Page: 66 - 72
Keywords:
Nominee Agreement, bad ethics, fake agreement, legal smuggling

Abstract:
The practice of nominee agreements has occurred in Indonesia repeatedly; the agreement uses the power of attorney where the agreement uses the name of an Indonesian citizen to transfer power of attorney to a foreign citizen. A Nominee Agreement made by two parties, namely between an Indonesian citizen and a foreign citizen as the attorney (Nominee), is made through an agreement package to provide all authority that may arise in the legal relationship between a person and his land to a foreign party as a person who is given the power to act as the actual owner. The agreement borrows the name of an Indonesian citizen as the Nominee, and this is a legal smuggling because its substance is contrary to Article 21 paragraph (1) and Article 26 paragraph (2) of Law Number 5 of 1960 concerning the UUPA. In addition, the existence of a loan agreement in the name must be based on the terms and principles of freedom of contract as stipulated in Article 1320 and Article 1338 Paragraph (1) of the Civil Code. For this reason, an objective and comprehensive attitude and understanding are needed from the NotaryNotary in assessing the contents of the land sale and purchase agreement, primarily related to the one-sided agreement. In reality, in the author's opinion, nominee agreements do not comply with the positive law in force in Indonesia because the purpose of this agreement contains elements of bad ethics.

INTRODUCTION

An agreement in the field of land is an agreement made by a person who, according to the law, cannot be the subject of land rights, in this case, a Foreign Citizen with an Indonesian Citizen, with the intention that the foreign citizen can control (own) the right to land ownership (Hetharie, 2022). The practice of borrowing this name has been rampant in various provinces in Indonesia, especially in big cities such as Jakarta, Surabaya, Bali and the Riau Islands. Generally, the practice of foreigners wanting to own or control land through a *nominee* agreement by using land as a business activity and there is a reason why this practice was chosen because the Supreme Court of the Republic of Indonesia (SEMA) issued Circular Letter Number 10 of 2020 concerning the Implementation of the Results of the 2020 Supreme Court Plenary Session because the property of the owner of a piece of land is used by other parties, in this case foreigners through a *nominee* agreement by utilizing the land as a business activity (Anwar & AlfarisiMuhammad Salman, 2022; Meliala, 2020; Sudini & Utama, 2018).

In addition, foreign parties who want to invest in land or buildings have not been able to obtain land rights because they are faced with the provisions of Law Number 1960 concerning Basic Regulations on Agrarian Principles (UUPA), which limits property rights to it is difficult to do. Foreigners are prohibited from entering land owned and belonging to Indonesian citizens. The question is, why should foreigners not have land ownership status in Indonesia? This is because,

CATRA RESEARCH INSTITUTE
PJLEL
P-ISSN - 2830-4675 (PRINT)
E-ISSN - 2964-724X (ONLINE)
PROTECTION: JOURNAL OF LAND AND ENVIRONMENTAL LAW
KSI
Indexed By : GARUDA Google ISJD EBSCO

indeed, in the UUPA, as a principle of national land law, it is mentioned in one of its explanations in number five, namely the principle that only Indonesian citizens can have property rights to land (Putri et al., 2021).

This principle emphasizes that only Indonesian citizens who are in the position of property rights subjects, namely people who are Indonesian citizens in addition to foreign citizens, cannot also have property rights. Foreigners domiciled in Indonesia cannot have land with ownership status but can only have land with the status of use rights and lease rights, even for a limited time. With the background mentioned above, it is not surprising that many foreigners who want to invest in Indonesia take shortcuts by borrowing the names of Indonesians to use the land to support their business activities.

Therefore, in the author's view, it is important that this material is important to understand and must be a more significant concern for the public in general and especially to PPAT Notaries, to be careful in carrying out their duties related to the implementation of land sales related to Indonesian citizens and foreigners related to the *Nominee* agreement. Article 20, paragraph (2) of the UUPA, in principle, emphasized that the transfer of land means that a legal act causes the ownership of land from the owner to another party. The legal act in question is an act that causes legal consequences. Examples of legal disputes are buying and selling, exchanging tura, grants, income in company capital (inbred) and auctions. Furthermore, the subject of land ownership is stipulated in Article 21 and its implementing regulations, namely, Indonesian citizens and legal entities determined by the Government.

Indeed, landowners are obliged to use and cultivate their land actively. In this case, the UUPA also stipulates that land ownership can only be used and cultivated by non-owners, as affirmed in Article 24 of the UUPA; namely, the use of land owned by non-owners is only limited and regulated by legislation. Several forms of land use or land exploitation of ownership by non-owners, namely, ownership of land encumbered by HGB, property rights on land encumbered with use rights, lease rights for buildings, pawns, profit-sharing business rights, hitchhiking rights and agricultural lease rights (Santoso, 2015).

Reflecting on the above explanation, before discussing further "*Nominee in the Practice of Buying and Selling Land in Indonesia*," it would be better first to know the provisions of Article 21 paragraph (1) and Article 26 paragraph (2) of Law Number 5 of 1960 concerning the UUPA which prohibits foreigners from owning land with property rights status in Indonesia. The illustration in Article 26 paragraph (2) of the UUPA is as follows: that every sale, exchange, grant, gift by will and other acts intended to directly or indirectly transfer property rights to a foreigner to a citizen who, in addition to Indonesian citizenship, has foreign citizenship to a legal entity except as stipulated by the Government in Article 21 paragraph (2), is null and void because the law and the land fall to the state with the provision, that the rights of the other party who burden it remain intact and all payments that the owner has received cannot be redetermined.

The desire of the Indonesian state to have a legal order that regulates buying and selling certainly meets the legal principles outlined in the UUPA. Then, the rule is also emphasized in the provisions of Article 41 and Article 42 of the UUPA. In addition, Government Regulation Number 10 of 2015 concerning the Ownership of Residential or Residential Houses by Foreigners in Indonesia regulates similar prohibitions (Shobirin et al., 2019; Yohanes et al., 2022). Legally, the practice of *nominee* contracts in contract law in Indonesia is classified as representing the emergence of legal smuggling due to prohibitions in both the form of regulations and laws (Prakosa, 2023). It can also be said that the existence of a *Nominee* Agreement must be based on the principle of freedom of contract based on Article 1338 paragraph (1) of the Civil Code. What does that mean? Even though

CATRA RESEARCH INSTITUTE
PJLEL
P-ISSN - 2830-4675 (PRINT)
E-ISSN - 2964-724X (ONLINE)
PROTECTION: JOURNAL OF LAND AND ENVIRONMENTAL LAW
KSI
Indexed By : GARUDA Google dof Crossref ROAD ISJD EBSCO

the principle of freedom of contract allows anyone to enter into a contract with anyone, the contract made must meet the conditions for the validity of the contract stipulated in Article 1320 of the Civil Code, which requires that the agreement must meet four conditions, namely: agreement, skill, particular objects and halal causa.

Causa halal is based on the provisions of Article 133 and Article 1337 of the Civil Code, which stipulates that contracts must not violate public order and morals. In essence, this name lending agreement allows foreigners whose names are not listed in the certificate of ownership of land to act as if they are the owner of the land, which is a violation of Law Number 5 of 1960 concerning the Basic Regulations on Agrarian Principles (UUPA) allowing people to take action (Silaban, 2020). Therefore, a name loan contract in the sale of land can be considered legal smuggling that can damage the legal order. Regarding our legal system, we do not recognize the difference between legal owners and beneficiaries. Indonesia only recognizes the rightful owner as proof of certificate ownership. This means that money owners who ask for assistance borrowing names (*nominees*) still cannot be recognized as land rights owners. Because there is no legal basis to cancel the proof of ownership document based on a *nominee* agreement. In fact, the *nominee* agreement is considered null and void; even so, according to Hotma Paris Hutapea, SEMA Number 7 of 2012 opens up opportunities for money owners as beneficiaries to sue for compensation to the person whose name is borrowed (Hutapea, 2020).

METHODS

The legal research used for this writing is normative research using the normative law research method, which can also be called doctrinal legal research, where it is aimed at written laws and regulations, so this research is closely related to the existence of literature studies. In using a problem approach, namely the legislative approach, legal concept analysis, case approach and comparative approach, the author's legal sources use primary legal materials and even secondary law and tertiary legal materials. The legal collection technique uses document study and recording techniques. The analysis technique uses analytical descriptions (Arnawa et al., 2024; Utama, 2022).

RESULT AND DISCUSSION

Nominee Arrangement in The Practice of Buying and Selling Land in Indonesia. Before discussing the *Nominee agreement* or name loan agreement, it is first necessary to know from the understanding of the agreement. Agreements have the same legal force as legislation. Thus, agreements made by certain parties can be used as a legal basis for those who make them (Haryono, 2019). However, what distinguishes a contract agreement from the law and regulations is that the agreement only applies to the parties who bind themselves in the agreement. The laws and regulations apply to the entire community or the parties that are the subject of its regulation. Some economic experts are of the view that the term contract or agreement is a contract that is explicitly written, but it is not inferred from the circumstances or actions carried out by the parties to the contract. So, the contract seems to be forced and applied through a system of market mechanisms that affects a person's reputation and is not forced through the courts. However, the method of enforcement does not necessarily provide satisfaction for the party who is cred but punishes the party who violates the agreement within a certain period (Harviah et al., 2024). In contrast to the view of legal experts, the term "Contract" or "Agreement" is an agreement between the parties in a legal system and will then be forced to take effect if one of the parties to the agreement does not fulfill its promise. So, legal experts conclude that the definition of contracts and agreements,

CATRA RESEARCH INSTITUTE
PJLEL
P-ISSN - 2830-4675 (PRINT)
E-ISSN - 2964-724X (ONLINE)
PROTECTION: JOURNAL OF LAND AND ENVIRONMENTAL LAW
KSI
Indexed By : GARUDA Google dof Crossref INDEX COPERNICUS ROAD ISJD Indonesia OneSearch EBSCO

according to economic experts, has a different meaning when compared to the definition or definition according to legal experts (Hamilton, 1996).

Based on the problem of the practice of the Land Sale and Purchase Agreement (PPJB), in this case, is subject to the rules of the agreement in general, as referred to in Book III of the Civil Code (Yuliani et al., 2022). The conditions for the validity of PPJB are also subject to the conditions for the validity of the agreement as stipulated in Article 1320 of the Criminal Code, which is the existence of an agreement, the parties are capable of making an agreement, the existence of a certain thing and a halal cause (Subekti & Tjitrosudibio, 2005). In essence, the legal conditions of an agreement must meet these four conditions, so if one of the legal conditions is not met, the agreement can be canceled or null and void (Subekti, 2005).

The practice of nominee agreement contracts or name loan agreements has repeatedly happened in Indonesia. Usually, these contracts use a power of attorney, where the contract uses the name of an Indonesian Citizen and gives power of attorney to a foreigner to carry out legal enforcement on the land he owns. Prof. Maria Sri Wulan Sumardjono said that a *nominee* contract is an agreement between a person who, according to law, cannot be the subject of a right (property rights) or a particular land, in this case, a foreigner and an Indonesian Citizen, with the intention that the foreigner can manage (own) the land de facto, but legally and formally (legally) the ownership of the land is in the name of an Indonesian Citizen. In other words, the names of Indonesian citizens are accepted to be borrowed by foreigners to act as *nominees* (M. SW. Sumardjono, 2006).

The embodiment of the *Nominee* agreement, according to Prof. Maria Sri Wulan Sumardjono, is an agreement made by two parties, namely between Indonesian citizens and foreigners, as the power of attorney (*Nominee*) created through a package of agreements, in essence, intending to provide all authority that may arise in the legal relationship between a person and his property (land), The foreigner is authorized to act as the legal attorney as the actual owner of the property (Property Rights or Building Rights) which according to the law cannot be owned. The agreement borrows the name of an Indonesian citizen as a candidate, and the substance is considered smuggling because it violates and contradicts the UUPA (M. et al., 2007).

Furthermore, according to Professor Maria Sumardjono, the existence of other agreements after the main agreement related to the control of land rights by foreigners gives rise to legal smuggling. This is related to the fact that a contract of agreements made by a Notary to secure a property that is the object of a *nominee* is essentially based on bad faith. Has injured the prestige of the Notary profession itself and, of course, very contrary to Article 16 paragraph (1) the letter of law No. 2 of 2014 concerning Amendments to Law No. 30 of 2004 concerning the Notary Position which states that "In carrying out his position, Notaries are obliged to act trustfully, honestly, thoroughly, independently, impartially, and safeguard the interests of related parties in legal acts."

Considering the arguments above, notaries – the existing mechanisms and regulations must always guide PPAT. According to Agus Yudha Hernowo, the *nominee* agreement contradicts several existing regulations, for example, Article 21 paragraph (1) and Article 26 paragraph (2) of the UUPA. Agus Yudha Hernowo reminded us of the importance of interpreting the agreement's content, especially what the parties have agreed upon. In this case, the NotaryNotary only traces the parties involved. However, in certain circumstances, Notaries are prohibited from doing deeds if there is a prohibited legal subject (Budiono, 2020). The duties and obligations of the NotaryNotary shall be based on the applicable regulations and the Notary Office Act. In essence, the NotaryNotary must comply with the requirements in making the deed because if there is an unlawful act, the NotaryNotary will also be held accountable.

CATRA RESEARCH INSTITUTE
PJLEL
P-ISSN - 2830-4675 (PRINT)
E-ISSN - 2964-724X (ONLINE)
PROTECTION: JOURNAL OF LAND AND ENVIRONMENTAL LAW
KSI
Indexed By : GARUDA Google ISJD EBSCO

The author believes that in responding to the above, of course, an objective and comprehensive attitude and understanding from the Notary is needed in assessing the content of the agreement, primarily related to the one-sided content of the agreement. In fact, the *nominee* agreement, in the author's view, is not in accordance with the positive law that applies in Indonesia because the purpose of this agreement has an element of bad ethics. Then, the Indonesian citizen as the party who lent his name in the *nominee* agreement will have an impact on the status of the land rights that are the object of the agreement, where the Indonesian citizen is automatically responsible for taxes and elections on the land.

In experts' opinion, the *nominee* agreement is categorized as a fake agreement because, in the positive law that applies in Indonesia, the term *Nominee* is not known. Of course, the application of the *Nominee* itself is contrary to the applicable law. In a lease agreement, for example, between a foreigner and an Indonesian citizen, a *nominee* is not required as long as the person is capable of acting legally to carry out the agreement. Regarding the pretended agreement, according to Herlien Budiono, the pretended agreement is a deviation from the agreement to carry out a specific legal action that is contrary to what should have happened by the parties secretly and consciously. Therefore, the things stated in the agreement or deed are not in accordance with the actual legal act.

CONCLUSION

"*Nominee in the Practice of Buying and Selling Land in Indonesia*," contrary to the provisions of Article 21 paragraph (1) and Article 26 paragraph (2) of Law Number 5 of 1960 concerning the UUPA, which prohibits foreigners from owning land with property rights status in Indonesia. The illustration in Article 26 paragraph (2) of the UUPA is as follows: that every sale, purchase, exchange, grant, gift by will and other acts intended to directly or indirectly transfer property rights to a foreigner to a citizen who, in addition to Indonesian citizenship, has foreign citizenship to a legal entity except as stipulated by the Government in article 21 paragraph (2), is null and void because the law and the land fall to the state with the provisions, that the rights of the other party who incriminate him remain slender and that all payments that the owner has received cannot be redetermined.

An objective and comprehensive attitude and understanding from the notaryNotary is needed in assessing the content of the agreement, primarily related to the one-sided content of the agreement. In fact, the *nominee* agreement, in the author's view, is not in accordance with the positive law that applies in Indonesia because the purpose of this agreement has an element of bad ethics. Then, the Indonesian citizen as the party who lent his name in the *nominee* agreement will have an impact on the status of the land rights that are the object of the agreement, where the Indonesian citizen is automatically responsible for taxes and elections on the land.

REFERENCES

Anwar, K., & AlfarisiMuhammad Salman. (2022). Status of Implementation of Corruption Criminal Offices Related to State Financial Loss in Soe Subsidiaries. *Budapest International Research and Critics Institute-Journal (BIRCI-Journal)*, *5*(1). https://doi.org/https://doi.org/10.33258/birci.v5i1.4420

Arnawa, I. M., Kosasih, J. I., & Utama, I. W. K. J. (2024). Pembatalan Land Lease Agreement yang dialihkan kepada Pihak Ketiga. *Jurnal Ilmu Hukum, Humaniora Dan Politik*, *4*(6). https://doi.org/https://doi.org/10.38035/jihhp.v4i6.2565

CATRA RESEARCH INSTITUTE
PJLEL
P-ISSN - 2830-4675 (PRINT)
E-ISSN - 2964-724X (ONLINE)
PROTECTION: JOURNAL OF LAND AND ENVIRONMENTAL LAW
KSI
Indexed By : GARUDA Google ISJD ROAD EBSCO

Budiono, H. (2020). *Ajaran Umum Hukum Perjanjian dan Penerapannya Di Bidang Kenotariatan*. Citra Aditya Bakti.

Hamilton, R. W. (1996). *The Law Of Corporations*. St. Paul, Minn.: West Publishing.

Harviah, M. D., Santosa, I., & Muda, I. (2024). The Notary's moral responsibility is to provide legal counseling to the parties in making the sale and purchase deed. *Jurnal Info Sains : Informatika Dan Sains*, *14*(01). https://doi.org/https://doi.org/10.54209/infosains.v14i01

Haryono. (2019). STUDY OF INDUSTRIAL RELATIONS: LABOR UNION, WORK AGREEMENT AND BIPARTIT. *SCIENTIFIC JOURNAL OF REFLECTION: Economic, Accounting, Management and Business*, *2*(2). https://doi.org/https://doi.org/10.5281/zenodo.2628076

Hetharie, Y. (2022). Kepemilikan Tanah Oleh Warga Negara Asing Melalui Perjanjian Pinjam Nama Sebagai Bentuk Penyelundupan Hukum Dalam Hukum Perdata Internasional. *Balobe Law Journal*, *2*(1), 12. https://doi.org/10.47268/balobe.v2i1.822

Hutapea, H. P. (2020). *Diskusi Publik "Praktik Kepemilikan Tanah Secara Langsung dan Perlindungannya (Terhadap Pembeli Yang Beretikad Baik Dalam Jual Beli Tanah."* https://www.hukumonline.com/events/baca/arsip/lt5e40ce1aab280/praktik-kepemilikan-tanah-secara-tidak-langsung-dan-perlindungannya-terhadap-pembeli-yang-beritikad-baik-dalam-jual-beli-tanah/

Meliala, I. P. S. (2020). CITIZENSHIP STATUS AND INHERITANCE OF ADOPTED CHILDREN CARRIED OUT BY SPOUSES OF FOREIGN NATIONALS IN INDONESIA. *International Journal of Research -GRANTHAALAYAH*, *8*(12), 121–129. https://doi.org/10.29121/granthaalayah.v8.i12.2020.2683

Prakosa, H. (2023). *Larangan Praktek Nominne Arrangement Dalam Persepektif Kemudahan Berusaha (easy of doing business)*. https://siplawfirm.id/larangan-praktek-nominee-arrangement-dalam-perspektif-kemudahaan-berusaha-easy-of-doing-business/?lang=id

Putri, T. M., HS, S., & Djumardin. (2021). Nominee Agreements in the Sale and Purchase of Proprietary Land by Foreign Citizens (Analysis of the Supreme Court Decision Number 50PK / PDT / 2016). *Journal of Law, Policy and Globalization*. https://doi.org/10.7176/JLPG/112-09

Santoso, U. (2015). *Perolehan Hak Atas Tanah*. Kencana.

Shobirin, Moh., Irianto, S., & RR. Widyarini Indriasti W. (2019). JURIDICAL ANALYSIS OF TENURE RIGHTS TO LAND BY FOREIGN CITIZENS IN KARIMUNJAWA ISLANDS, INDONESIA. *South East Asia Journal of Contemporary Business, Economics and Law*, *20*(5).

Silaban, J. (2020). Notary Responsibilities in the Making of Nominee Arrangement by Foreign Citizens Related to the Ruling of the Laws of Land in Indonesia. *International Journal of Trend in Scientific Research and Development*, *4*(6).

Subekti, R. (2005). *Hukum Perjanjian*. Interface.

Subekti, R., & Tjitrosudibio. (2005). *Kitab Undang-Undang Hukum Perdata*. Pradnya Paramita.

Sudini, L. P., & Utama, I. W. K. J. (2018). Nominee Agreement Made For The Purposes Of Land Ownership By Foreign Citizens based on A. *Jurnal Notariil*, *3*(2), 109–115. https://doi.org/10.22225/jn.3.2.849.109-115

Sumardjono, M. S. W. (2007). *Aternatif Kebijakan Pengaturan Hak Atas Tanah Beserta Bangunan Bagi Warga Negara Asing dan Badan Hukum Asing*. Kompas.

Sumardjono, M. SW. (2006). *Kebijakan Pertanahan antara Regulasi dan Implementasi*. Kompas.

CATRA RESEARCH INSTITUTE
PJLEL
P-ISSN - 2830-4675 (PRINT)
E-ISSN - 2964-724X (ONLINE)
PROTECTION: JOURNAL OF LAND AND ENVIRONMENTAL LAW
KSI
Indexed By : GARUDA Google dor Crossref ROAD ISJD EBSCO

Utama, I. W. K. J. (2022). EMPOWERMENT OF BUPDA REFORM ACCESS IN VILLAGE LAND ASSET MANAGEMENT IN BALI. *NOTARIIL Jurnal Kenotariatan*, *7*(1), 9–12.

Yohanes, A. S., Ramalinda, D., Pertiwi, L. E., Kumalawijaya, A. P., Rahmawan, F. S., Nurdin, S., Ilyasa, M. F., & Fauzan, H. (2022). Competency of legal subjects in informed consent as a standard agreement. *International Journal of Health Sciences*, *6*(3), 1535–1543. https://doi.org/10.53730/ijhs.v6n3.13185

Yuliani, N. A., Rodhiyah, S., & Istinah, D. (2022). Juridical Study of Agreements Between Developers and Home Buyers in Failed to Build Issues. *Jurnal Konstatering*, *1*(1).